STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

No. 2020AP001302-CR

STATE OF WISCONSIN,
Plaintiff-Respondent

v.

TODD DI MICELI,
Defendant-Appellant

ON APPEAL FROM AN ORDER DENYING A MOTION TO SUPPRESS EVIDENCE, ENTERED IN DODGE COUNTY CIRCUIT COURT, THE HONORABLE MARTIN DEVRIES, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUES

Is the delay in service of a subpoena under §968.375(3) remedied by suppression of the subpoena and any derivative evidence that comes therefrom?

In its brief, the Respondent argues that the trial court should have addressed the language in §968.375(12), not whether "shall" is mandatory as it is written in §968.375(6). The first issue in this case under §968.375(6) is whether the delay in service of a subpoena is a technical irregularity. The second issue is whether the delayed service of the subpoena was an error that affected Mr. Di Miceli's substantial rights.

This Court should answer no, this was not a technical irregularity. This Court should also answer yes, this did substantially affect Mr. Di Miceli's rights. As such, the subpoena is void and should be suppressed. Additionally, "shall" is mandatory and the delayed execution of the subpoena is a fundamental error that requires the subpoena be suppressed.

STATEMENT OF THE CASE AND FACTS

The facts in this case are not in dispute. (R. 29:1, App. To Appellant's Br. 28.) In Respondent's Brief as well as the court's order, it is noted that the warrant was executed on January 27, 2016. (R. 29:2, Respondent's Br. 3.) However, per the Criminal Complaint, the warrant was executed on January 28, 2016. (R. 11:5.)

ARGUMENT

Regardless of the avenue this Court uses to evaluate this issue, the proper remedy is suppression of the subpoena.

I. In assessing this issue under §968.375(12), the untimely service of a subpoena was not a technical irregularity, and it did affect Mr. Di Miceli's substantial rights. As such, the subpoena is void and should be suppressed.

A. Untimely execution of the subpoena is not a technical irregularity.

The Respondent in this matter argues that the delay in execution of a subpoena under §968.375(3) should be reviewed under the purview of §968.375(12), rather than evaluating how "shall" is

defined in §968.375(12). The Respondent argues that the delayed execution of the subpoena is a technical irregularity based on previous case law, and Di Miceli's case is distinguishable from them.

In *State v. Tye*, 2001 WI 124, ¶ 2, 248 Wis. 2d 530, 636 N.W.2d 473, the Court suppressed the search warrant because the supporting affidavit was not sworn to under oath or affirmation as required by the Constitution. While the Respondent seems to use this case to set a "standard" for suppression of a warrant, it is not *the* standard.

In *State v. Raflik*, 2001 WI 129, ¶ 3, 248 Wis. 2d 593, 636 N.W.2d 690, the Supreme Court held that because testimony in support of a search warrant was reconstructed after it had not been recorded, this was a technical irregularity and the defendant's Fourth Amendment rights could still be protected because the warrant application was reconstructed eighteen hours after the fact. In Mr. Di Miceli's case, no second subpoena was ever sought to correct the error.

In *State v. Elam*, 68 Wis. 2d 614, 620, 229 N.W.2d 664 (1975), the Court held that the delayed filing of a search warrant transcript was a technical irregularity. The Court synonymized *Elam* with *State v. Meier*, where the warrant was not returned to the court within 48 hours as required by statute. Because this was a ministerial duty, it did not affect the validity of the search warrant and therefore did not prejudice the defendant's rights. *Id.* at 620, 668. Mr. Di Miceli's case is distinguishable from both *Elam* and *Meier* because the delayed service of the subpoena occurred before the search warrant was executed and directly impacted the contents of the search warrant that was later executed at Mr. Di Miceli's home.

The Respondent also cites to *State v. Sveum*, 328 Wis. 2d 369, ¶¶ 5–8, 71, and *State v. Nicholson* 174 Wis. 2d 542, 544, 497 N.W.2d 791 (Ct. App. 1993). In *Sveum*, the warrant was executed timely but was not returned to the court within five days as directed. 328 Wis. 2d ¶72. In *Nicholson*, there

was an incorrect street address on the warrant, but the affidavit contained the correct one and police executed the warrant at the correct address. 174 Wis. 2d 544. Neither of these cases can be synonymized with the case at hand.

Read as a whole, the cases that hold for technical irregularities either address missed deadlines after a warrant has been legally executed or were able to be salvaged because of swift action. The grave error in Mr. Di Miceli's case took place prior to the execution of both the subpoena and the warrant, and no other subpoena was sought once the five-day deadline passed. This delayed execution of the subpoena was not a technical irregularity.

B. The untimely execution of the subpoena did substantially affect Mr. Di Miceli's rights and the subpoena is void.

Under our country's Constitution, "No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

In the case at hand, law enforcement obtained a subpoena looking for the owner of the IP address that was allegedly sharing illegal images on the P2P network. The purpose of finding the owner of the IP address was for law enforcement to identify who they believed was sharing this content and execute a search warrant for that person's home. Without the subpoena, the search warrant would not have been able to identify the persons to be seized as required by law. As such, this subpoena led directly to a search warrant being issued by a court official because, with the identity of who was to be searched, it met the requirements of a search warrant. Thus, it directly affected Mr. Di Miceli's right to be free from search and seizure.

In *Tye*, the Court stated, "An oath preserves the integrity of the search warrant process and thus protects the constitutionally guaranteed fundamental right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." 2001 WI 124 at

¶ 19. Mr. Di Miceli argues that the identification of the person or place to be searched also preserves the integrity of the search warrant process.

The Respondent in its brief further argues that Mr. Di Miceli lacks an expectation of privacy to the information from Spectrum Charter and argues that this further supports the notion that the delayed execution of the subpoena did not substantially affect his rights. The protection against unreasonable searches and seizures under the Fourth Amendment "extends only to areas in which there is a reasonable expectation of privacy." *State v. Guard*, 2012 WI App 8, ¶ 16, 338 Wis.2d 385, 808 N.W.2d 718.

In considering Mr. Di Miceli's expectation of privacy in this matter, he had a right to privacy with his identifying information that Spectrum Charter possessed. If Mr. Di Miceli did not have an expectation of privacy to that information, law enforcement would not have had to obtain a subpoena. Just like a search warrant, probable

cause must be shown in order to obtain the subpoena. As the Respondent notes in its brief, "A determination of probable cause protects providers and customers from indiscriminate searches of their records." Resp. br. at 19.

Respondent also cites to *State v. Baric*, 2018 WI App 63, 384 Wis. 2d 359, 919 N.W.2d 221, in its argument regarding Mr. Di Miceli's lack of expectation of privacy in this matter. While files were publicly shared over a P2P network like the case at hand, Baric argued that he had an expectation of privacy to the files that he was sharing over the P2P network. *Id.* ¶¶ 17. The case at hand is distinguishable in two ways. First, Mr. Di Miceli argues that he had an expectation of privacy to the identifying information held by Spectrum Charter, not the files that were made available on the P2P network. Second, law enforcement was required to obtain a subpoena in order to gain access to Mr. Di Miceli's identifying

information. Police did not need a subpoena to view the files on the P2P network in Baric's case.

Because Mr. Di Miceli's rights were substantially affected and he had an expectation of privacy to his identification records, the subpoena is void and should be suppressed.

C. In order to suppress the subpoena, this Court need only find that either the delayed execution of the subpoena was not a technicality or that Mr. Di Miceli's rights were substantially affected, not both.

The plain language of §968.375(12) does not presume against suppression. In fact, spelling out two scenarios in which suppression is not appropriate would indicate that suppression is appropriate *except* for these two scenarios.

Further, this Court need not find that it was not a technical irregularity *and* that Mr. Di Miceli's substantial rights were affected. Wis. Stat. §968.375(12) provides: "Technical Irregularities: Evidence disclosed under a subpoena or warrant issued under this section shall not be

suppressed because of technical irregularities or errors not affecting the substantial rights of the defendant." It need only find one or the other. In the principles of statutory interpretation, "The meaning of 'or' is plain: 'or' is a connector of alternative choices in a series. In an everyday setting, "or" is interpreted disjunctively. *Hull v. State Farm Mut. Auto. Ins. Co.*, 222 Wis. 2d 627, 638, 586 N.W.2d 863, 867 (1998).

As such, while Mr. Di Miceli argues that the delayed execution of the subpoena did both affect Mr. Di Miceli's substantial rights and was not a technical irregularity, this Court need only find one or the other to order that the subpoena is void and should be suppressed.

II. Because "shall" is mandatory in Wis. Stat. §968.375(6), the delay of the execution of the warrant is a fundamental error, which also calls for suppression.

While Mr. Di Miceli will not re-argue all points on whether "shall" is mandatory, he will use this opportunity to address the factors in *State v.*

R.R.E., 162 Wis. 2d 698, 470 N.W.2d 283, as they were addressed by the Respondent. Those factors include the statute's objectives, the statute's history, the consequences that follow from alternative interpretations, and whether a penalty is imposed for a violation of the statute. *Id.*

Based on its guidance for subpoenas and warrants, Wis. Stat. §968.375 exists to provide guidelines for law enforcement in obtaining records or communications that are otherwise protected under the Constitution. Respondent argues that this statute protects Internet Service Providers by creating rules for when a warrant or subpoena can be obtained from the ISP.

However, Mr. Di Miceli argues that the requirement to show probable cause exists to protect the subscriber. Requiring the showing of probable cause before obtaining records from an ISP would serve to protect the subscriber from any Fourth Amendment violations, where the probable cause requirement only protects providers from

unlimited numbers of records requests by law enforcement.

As for the consequences of "shall" becoming mandatory, if law enforcement will not honor an individual's constitutional right to be free from illegal search and seizure, then the consequences are suppression regardless of how serious the charges are. Law enforcement officers should be cognizant of this fact. In the case at hand, all police had to do was obtain a new subpoena once the 5-day deadline passed, but they chose to move forward with the original subpoena and, therefore, the remedy is suppression.

As for the last factor in *R.R.E.*, the Respondent argues that there is no penalty for violating the five-day service requirement. To loop in a previous argument, §968.375(12) should be interpreted to read that suppression is the remedy unless the error is a technical irregularity or does not affect the defendant's substantial rights.

While the penalty for the statute is considered as a factor for whether "shall" is mandatory, suppression is the remedy regardless of how this error is analyzed.

III. The remedy is not remand, this subpoena should be considered void and suppressed.

If the subpoena is not suppressed and there is no penalty for this error, then the requirement the subpoena be executed in five days serves no purpose. Law enforcement would find itself free to execute a subpoena whenever it saw fit. Remanding this case would not serve as any remedy, it would merely supplement the record that this Court could review. The general facts remain the same, and the law supports the suppression of the subpoena.

As stated previously, this subpoena led directly to the search warrant requirement of who or what is to be searched, and as such is fruit of the poisonous tree. "[I]n its broadest sense, the [fruit of the poisonous tree doctrine] can be regarded ... as a device to prohibit the use of any

secondary evidence which is the product of, or which owes its discovery to illegal government activity." *State v. Schlise,* 86 Wis.2d 26, 45, 271 N.W.2d 619 (1978). A statute does not have to call for suppression of evidence subsequently derived through a violation of that section. In fact, most do not.

CONCLUSION

For the foregoing reasons, Mr. Todd Di Miceli respectfully requests that the Court reverse the decision of the circuit court's denial of Mr. Di Miceli's Motion to Suppress and find that the subpoena and derivative evidence should be suppressed.

Dated this 12th day of February, 2021.

Respectfully submitted,

Electronically signed by
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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c), and is produced with a monospaced font. The length of this brief is 2212 words. See Wis. Stat. §809.19(8)(c)2., 809.50(4).

Dated this 12th day of February, 2021.

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. §809.19(12)(f)

I hearby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 12th day of February, 2021.

Electronically signed by
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